No. 14188

United States
COURT OF APPEALS
for the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

BRIEF OF APPELLANT McKENNEY LOGGING CORPORATION

Appeals from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-54

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To avoid repetition, Appellant McKenney Logging Corporation adopts the "Jurisdictional Statement"; the "Statement of the Case"; the "Specifications of Errors";

the "Statement of Facts"; and the "Arguments" in the brief of the Appellants Einar Glaser and Dorothy Glaser, and the arguments on the questions of damages in the brief of Appellants Bart McKenney and Marie McKenney.

This brief, therefore, will be confined to the specifications of error affecting Appellant McKenney Logging Corporation alone.

In this brief, the parties will be referred to, the same as in the brief of Appellants Einar Glaser and Dorothy Glaser, to-wit:

Buffelen Manufacturing Co., Appellee, will be referred to as the "Lumber Company"; McKenney and Glaser as the "Logging Company"; and McKenney Logging Corporation as the "Corporation".

POINT I

The Court below erred in holding that McKenney Logging Corporation unlawfully interferred with and induced the Logging Company to breach its contract with the Lumber Company. The mere knowledge of the contract between the Lumber Company and the Logging Company does not constitute inducement to breach the contract.

Summary of the Argument

A.

There is no substantial, or even a scintilla of, evidence that the Corporation committed any affirmative act constituting coercion or inducement of the Logging Company to breach its contract with the Lumber Company.

B.

The mere fact, if it be a fact, that the Corporation had knowledge, actual or constructive, of the existence of the contract between the Lumber Company and the Logging Company, does not constitute coercion or inducement of the Logging Company to breach the contract.

Re Statement of the Law of Torts, Section 766, Comment (i);

Sweeney v. Smith, 167 Fed. 385, Aff'd 171 Fed. 645 (Third Cir.), Certiorari denied, 215 U.S., 600;

United States v. Newbury Mfg. Co., 36 F. Supp., 602 (D.C. Mass).;

Lamport v. 4175 Broadway, Inc., 6 F. Supp. 923;

30 Am. Jur., 75 (Title: Interference);

Caldwell v. Gem Packing Co., 125 P. 2d 901, 904;

Horth v. American Aggregates Corporation, 35 N.E. 2d 592, 597, 598;

Pestel Milk Co. v. Model Dairy Products Co., 52 N.E. 2d 651, 658;

Kelly v. Central Hanover Bank & Trust Co., 11 F. Supp. 497.

C.

The evidence establishes affirmatively that the Appellant Corporation did not seek out the Logging Company in connection with the purchase of the timber lands from the Logging Company. On the contrary, the Logging Company's Agents sought the Corporation and induced the Corporation to purchase the same from the Logging Company. The Corporation was merely a willing buyer of the timber lands and contracts.

Argument

The liability sought to be imposed on the Corporation is in *tort* and not for breach of contract.

Unlawfully inducing a breach of a contract without justification, is recognized only as a tort. It does not create a cause of action for breach of contract.

The *pre-trial* order in this case (Tr. 10, I), which "supersedes the pleadings which are now dispensed with" merely alleges in this respect (Tr. 14, VI) that Plaintiff contends that

> "Defendant McKenney Logging Corporation is liable to plaintiff . . . . . for interfering with the contract between plaintiff and defendants McKenney and Glaser and inducing a breach thereof."

There is no statement anywhere in *Plaintiff's contentions,* or in the *tendered issues* of fact, that the Corporation committed any specific act, or acts, which would constitute, in legal contemplation, inducement or coercion of the Logging Company to breach its contract with the Lumber Company, such as threats of boycott, or any other threat, or the offering of any consideration for the timber lands greater than that offered by the Lumber Company, or the like, or any other inducement.

The *findings of fact* do not recite or set forth the commission of any affirmative act by the Corporation which would constitute coercion or inducement. The only pertinent statements in the findings of facts (Tr. 84-90) are that the Corporation

"had knowledge of the contract," (Tr. 88, XI) . . . . .

and that

> "Plaintiff sustained damages . . . . . by reason of McKenney Logging Corporation's interference with and induring defendants McKenney and Glaser to breach the contract . . . . . " (Tr. 89, XIII).

This is not actually a finding of fact. It is merely a conclusion and is repeated in the conclusions of law (Tr. 93, XII), that

> "Corporation is liable to plaintiff . . . . for interfering with the contract . . . . . and for inducing a breach thereof."

The Corporation was held liable in tort for inducing the Lumber Company to breach the contract with the Lumber Company and damages were assessed against the Corporation (a) $50,000.00 (trebled by the judgment) for the value of timber allegedly removed by the Corporation from the timber lands described in that contract, on the theory that it was a trespasser, and (b) $118,000.00 for loss of profits resulting from the failure to sell logs for the operation of the Batterson Mill.

If the Corporation did not commit the tort of unlawfully inducing the Logging Company to breach the contract, it cannot be held liable in any event for either of the elements of damages assessed against it.

If the conclusory statement in the finding, referred to above, is deemed to be a finding of fact of inducement, we submit that there is no substantial evidence in the record, or even a scintilla of evidence, of any act on the part of the Corporation which constitutes inducement or coercion which caused the Logging Company to breach its contract

with the Lumber Company, assuming, without admitting, that it did so.

The subject matter of the contract between the Lumber Company and the Logging Company was not the sale of timber lands and timber contracts by the Logging Company to the Lumber Company. That contract had two aspects:

(a) The transfer of title to the timber lands and contracts to the Lumber Company as security for loans; and

(b) An option from the Logging Company to the Lumber Company to purchase logs after they are cut from the said timber lands.

The transaction between the Logging Company and the Corporation consisted of a sale of the timber lands and timber contracts from the Logging Company to the Corporation.

The transaction between the Corporation and the Logging Company was not initiated by the Corporation. It did not seek out the Logging Company.

The record establishes beyond question that the Logging Company was eager to dispose of its holdings and get out of the logging operation. McKenney testified:

> "A. Well, Mr. Holm knew that I wanted to sell; that I wanted to liquidate my—dissolve our partnership."

To that end, it first employed a broker named Kerr (Tr. 442). This broker negotiated a sale of the Logging Company's interests in the timber lands to Portland Manufacturing Company (Tr. 442). The contract was

made and earnest money was put up, but the transaction was rescinded because of the Lumber Company's refusal to consent to the transfer. Bart McKenney then interested Matott, Appellee's witness, in procuring a purchaser. Matott introduced McKenney to Mr. Errion, a broker who was engaged by the Logging Company to find a purchaser (Tr. 394), and he was given a listing by the Logging Company for the sale of the property (Tr. 406, 440). Errion introduced Buol and Carr (Corporation) to the Logging Company (McKenney and Glaser) and they then negotiated for the sale of the timber lands by the Logging Company to the Corporation.

There is evidence in the record (denied by Buol and Carr) to the effect that Buol and Carr (Corporation) were told, during the negotiations, about the contract between the Logging Company and the Lumber Company and that they saw a copy of it.

This is the sum total of the evidence as to what transpired between the parties, which resulted in the sale of the timber lands by the Logging Company to the Corporation. There is not one word of testimony of the commission of any affirmative act establishing, or tending to establish, that the Corporation coerced or induced the Logging Company to sell to the Corporation the timber lands and timber contracts. The Logging Company through its agents solicited the Corporation to purchase the property.

It is settled law that the mere knowledge of the existence of the contract does not constitute coercion or inducement.

Section 766 of the Restatement of Law of Torts, comment (i), says:

> "MAKING AGREEMENT WITH KNOWLEDGE OF THE BREACH. One does not induce another to commit a breach of contract with a third person under the rule stated in this section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person. (Compare comment (h)). For instance, B. is under contract to sell goods to C. He offers to sell them to A who knows of the contract. A accepts the offer and receives the goods. A has not induced the breach and is not subject to liability under the rule stated in this section."

In *Kelly v. Central Hanover Bank & Trust Co.,* 11 F. Supp., 497 (U.S.D.C., S.D. New York), Judge Mack held:

> "They seek to have the court create a liability in equity, based on a knowing participation in, though not the inducing of a breach of contract when, for that breach, the remedy at law against the promisor is inadequate, because of its insolvency, actual or highly probable. Such *noninducing interference or participation* by the third party *is not actionable at law as a tort* (citing cases)." (Emphasis supplied.)

In *Sweeney v. Smith,* 167 Fed. 385 (C.C. Pa.), aff'd 171 Fed. 645, Cert. Denied 215 U.S. 600, plaintiff entered into a contract with a committee of stockholders and bondholders of a corporation in the hands of a receiver, to purchase all of the stocks and bonds lodged with the committee at a fixed price. The purchase would have given the plaintiff control of the corporation. After this contract was made, the committee entered into a contract with the defendant to sell to the defendant the same stocks and bonds and did sell, and the committee did deliver the

stocks and bonds to the defendant. *The defendant knew, at the time of the purchase, that the committee was under contract to sell the securities to the plaintiff*. Plaintiff sued the defendant in equity for an accounting of the profits realized by the defendant from the purchase of the securities on the ground that the purchase constituted an unlawful inducement to the committee to breach the contract with the plaintiff. The Court held:

> "In other words, while it may be supposed that the complainant meant to charge that Smith & Co. interfered with the carrying out of his contract of September 12th, and persuaded or induced the committee to break that contract, no such charge appears in the bill. The *only complaint is that Smith & Co. had prior knowledge of the complainant's contract* when they began the negotiations that resulted in the agreement of January 25th.
>
> "Under all the authorities the bill is fatally defective on this point. The complainant's *cause of action does not rest upon contract,* for he had no such relation with Smith & Co. It must be *founded on a tort,* on a wrong done by Smith & Co., and must be supported by the proposition that it is an actionable wrong to make a second contract with a promisor if he is known to have had a prior contract upon the same subject with another promisee. *In my opinion, this proposition is not sound.* The promisor may have excellent reasons for declining to be bound by the earlier contract, and these he need not disclose. If he chooses to take the risk of breaking the first agreement, that is his own affair, which may make him liable on that agreement, but imposes no obligation on the second promisee. It is enough for the second promisee that the agreement is now offered to him *without his own procurement or persuasion.* If he has done nothing to bring the situation about, *the mere fact that he knew of the first contract is no bar*

to his entering upon the second. Mere knowledge of the first does not make the second an actionable wrong; he is under no legal obligation to insist upon being told why the promisor declines to carry out the first contract, and is not bound to weight these reasons and decide at his peril whether they are good or bad. Before he can be called to account, some legal ground of liability must appear; he must participate in the breach before he can be held to blame; and the *mere knowledge that the first promisee intends to break the contract is not wrongful in itself,* and does not disable the second promisee from making the subsequent contract. *To be blameworthy, he must take some active step to bring about the breach. At the least, he must induce or persuade the first promisee to abandon the earlier agreement,* and even this he may sometimes do with impunity, unless the decisions in several jurisdictions are to be regarded as erroneous.

. . . . .

"I have been referred to no decision, and I have found none, in which mere knowledge of the earlier contract was held to be the equivalent of inducement or persuasion or (still less) of fraudulent conduct. In none of these elaborate considerations of the subject will there be found the slightest intimation that mere knowledge by a third person of a prior contract exposes him to suit if he shall in effect agree to take the place of the first promisee. In my opinion, therefore, the bill under consideration fails to set forth a cause of action against Edward B. Smith & Co." (Emphasis supplied.)

The Court also held that the plaintiff's remedy, if any, was in any event at law and not in equity, but the Court made no actual determination of this question because it was unnecessary to the decision having determined that there was no liability in any event.

On appeal, the Circuit Court of Appeals for the Third Circuit (171 Fed. 645) held:

> "The facts are that Sweeney had a contract with the committee by which he was to purchase these bonds and stocks. For some reason, which reason does not concern the present appeal, further than to say that Smith & Co. had no relation to or part in the committee's action, they refused to carry out their contract with Sweeney. The committee subsequently sold the stock and bonds to Smith & Co., who knew there had been a prior contract between Sweeney and the committee and that the latter refused to be bound by it. No allegation of fraud, bad faith, or any act of Smith & Co. to induce a breach of said contract by the committee, is here involved. Under these facts there is no liability of Smith & Co. to account to Sweeney. Neither privity of contract, accounts, nor a trust relation, express or implied, exists between them. The contention of liability to account as applicable to personal property finds support in no case, and would unduly trammel and preclude that merchantable character of personalty, which gives it its transmissible commercial value."

In *Caldwell, et al. v. Gem Packing Co., et al.,* 125 P. 2d, 901, 904, the Court held:

> " * * * However, if there was an adequate consideration for the transfer we know of no principle of law which would make Producers liable to plaintiff merely because *it sought to and did purchase its assets knowing* that the effect thereof would be to cause Gem to breach its contract. Even if the motive of Producers involved this supposed evil intent, motives are not actionable. * * * " (Emphasis supplied.)

In *Horth v. American Aggregates Corporation,* 35 N.E. 2d 592, 597, 598, the Court held:

"We determine that the entire record presents *no evidence on the issue of malicious inducement, other than evidence that defendant* at the time it entered into its contract with the Cable Brothers on June 6, 1935, and later on October 21, 1935, *had knowledge* that the Cable Brothers had previously contracted with Horth for some of the same work. * * * "

. . . . .

"By reason of the dearth of authorities in Ohio, we are moved to consider authorities and cases in other jurisdictions. In the Restatement of the Law of Torts adopted and promulgated by the American Law Institute, published May 13, 1939, under topic heading, 'Inducing Breach of Contract or Refusal to Deal,' Section 766, at page 59, under subheading 'i' we find the following: . . . . . "

The Text has already been quoted.

In *Pestel Milk Co. v. Model Dairy Products Co., et al.,* 52 N.E. 2d 651, 658, the Court held:

" . . . it is not a malicious inducement of a breach of contract for the Model Company to enter into an agreement with Burns and Dillon with knowledge that Burns and Dillon had a contract with the Pestel Company covering the same milk routes and with knowledge that both contracts cannot be performed." (Emphasis supplied.)

In Interference, 30 Am. Jur. 75, the text says:

"On the other hand, it is evident that mere knowledge of a contract relation between other parties concerning the subject matter of a transaction is not enough to hold one liable for procuring breach of contract. For example, the fact that a purchaser of bonds had knowledge that the seller had previously contracted to sell them to another does not render the purchaser liable to such other for damages because of the seller's breach of contract, in the absence of in-

ducement or persuasion to breach the contract, or of fraudulent conduct."

In *United States v. Newbury Mfg. Co.*, 36 F. Supp. 602 (D.C. Mass), the Court held:

"It is argued, however, in behalf of the plaintiff, that this corporation is liable to the plaintiff *in tort* for maliciously interfering with the performance of the contract made by Newbury.

. . . . .

"The allegations that Belmont was organized since the contract was made, with interest and control identical with Newbury, and that *with full knowledge of the restriction placed upon the sale* it purchased and re-sold a quantity of the goods, and that this was done pursuant to a conspiracy with Newbury to violate the terms of the contract, if proved, *do not, in my opinion, bring the case within the rule.*

. . . . .

"Belmont did not render Newbury unable to perform, or persuade it by fraud or deceit to pursue a course of conduct in violation of the plaintiff's contract. It is my opinion that the rule cannot be applied to a case where a successor corporation is employed by its predecessor as an instrumentality by which the latter proceeds to violate its contract." (Emphasis supplied.)

In *Lamport v. 4175 Broadway, Inc.*, 6 F. Supp. 923, the Court held:

"It is recognized generally that *it is a tort to induce another to break his contract,* and the question now is whether it is likewise a tort to make a contract *with notice that its performance will involve a breach by the other contracting party of an antecedent contract* with another. It was held in Sweeney v. Smith (C.C.), 167 F. 385, affirmed in (C.C.A.) 171 F. 645,

certiorari denied in 215 U.S. 600, 30 S.Ct. 400, 54 L.Ed. 343, that there is no liability in such a case.

. . . . .

There seems to be no case to the contrary.

"It may be argued that there is no difference in principle between a case where the defendant *actively induces* the breach of a contract between other persons and a case where he makes a contract which he knows will result in the breach of the antecedent contract; that the injury to the plaintiff in each case is the same. But the rule of liability in tort in these cases has never been pushed to its logical limits. *It is settled that mere negligent interference with a contract right is not a basis of liability,* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290; also that *mere nonfeasance does not subject a person to liability in tort,* although the nonfeasance may result in a breach of the plaintiff's contract. New York Trust Co. v. Island Oil & Transport Corporation (C.C.A.) 34 F. (2d) 649." (Emphasis supplied.)

The purchase of the Logging Company's interest in the timber lands and contracts from the Logging Company may be described in the language of Judge Mack in the Kelly case as

"noninducing interference or participation by the third party"

and as such

"is not actionable at law as a tort."

Under these authorities, the Corporation cannot be held liable for purchasing the timber lands and timber contracts from the Logging Company. The mere knowledge of the existence of the contract between the Lumber

Company and the Logging Company, did not, under the authorities, constitute a tort, to-wit, inducement to breach that contract.

Assuming, without admitting, that the Logging Company breached the contract, it alone would be liable for the damages resulting therefrom.

There is not the slightest intimation in the evidence that the Corporation purchased the timber lands for the express purpose of bringing about a breach of the contract between the Lumber Company and the Logging Company. The Corporation did not seek the purchase of these timber lands. It was solicited by agents of the Logging Company to purchase its equity in the timber lands. Its intention and purpose was to make a desirable purchase of timber lands and not to bring about or cause a breach of the contract. It agreed to pay $1,150,-000.00 for the timber lands.

The Logging Company did not believe it was committing a breach of the contract with the Lumber Company in selling its equity in the timber lands to the Corporation. The Logging Company believed that the timber lands and contracts were conveyed to the Lumber Company to secure the payment of loans; that, in legal contemplation, the Logging Company was a mortgagor and the Lumber Company a mortgagee with all the incidents inherent in that relationship; that upon the payment of the loans, the Lumber Company Mortgagee's interest in the property terminated and thereafter it held the naked legal title in TRUST for the Logging

Company; that it was then the owner of the property and had the right to sell it.

As a matter of law, the Logging Company was justified in that belief (Point I, Glaser and Glaser Brief). If the Corporation was chargeable with knowledge of the contract, it, too would be justified in believing that the Logging Company had the right to sell the property and that the Corporation had the right to buy it because Buel and Carr (the Corporation) had been told that the loans had been paid (Tr. 271).

Assuming, without admitting, that the Logging Company and the Corporation were both mistaken in their belief that the Logging Company had the right to sell its equities in the timber lands, the purchase of the timber lands by the Corporation does not constitute the *tort* of inducing a breach of the contract.

POINT II

The Court below erred in finding that the Corporation was guilty of trespass and rendering judgment against it for treble the value of timber ($50,000.00) alleged to have been removed by the Corporation from the Belding tract, being part of the timber lands purchased by the Corporation from the Logging Company.

Argument

The timber removed, for which damages were allowed in the sum of $50,000.00 and trebled by the judgment, is alleged to have been cut from the Belding tract.

When the Logging Company sold and conveyed all of the timber lands and timber contracts to the Corporation, the Logging Company had paid the Lumber Company in full for all "advances", including interest thereon. (Findings, Tr. 78, IV.)

Since the timber lands had been conveyed to the Lumber Company in the first instance as security for the "advances", it held the legal title for that purpose only, and when the "advances" were paid in full, it held only the naked legal title in TRUST for the Logging Company. The Logging Company was then, in equity, the sole owner of the timber lands and contracts (Point I Glaser & Glaser Br.).

Assuming, without admitting, that the option to the Lumber Company to purchase logs at market prices survived the payment of the indebtedness, that option did not, and could not, affect the Logging Company's ownership of the timber lands. The only thing that survived, was the option to purchase the logs that would be cut therefrom. After payment was made of all "advances", the Logging Company was cutting its own logs from its own timber lands of which *it was, at all times in possession.*

It is conceded that the Logging Company was not a trespasser at any time on these timber lands. (Tr. 286.) It is only claimed that the Corporation was a trespasser. (Tr. 286.)

When the Logging Company sold the timber lands to the Corporation, it sold its own lands; it was in possession thereof and passed its equitable title thereto, to the

Corporation. When the Corporation cut timber on the Belding Tract, it was not a trespasser. It had the possession of the lands and it had the equitable title thereto as grantee from the Logging Company who had the equitable title *and possession.*

Assuming that the Lumber Company had a subsisting option to purchase logs (not timber lands), the Corporation took the equitable title to the timber lands subject to that option and if exercised by the Lumber Company, it was bound to honor it. But the subsistence of that option did not affect (a) the Corporation's possession, and (b) its equitable title.

Trespass is an invasion of one's *possession or right of possession* of lands. *The Lumber Company had neither possession, nor right of possession.* The holding of the naked legal title in TRUST for the owner did not give the Lumber Company any cause of action for trespass *as against the owner of the equitable title who was in possession.* A mortgagor in possession, is not a trespasser as against the mortgagee. The Lumber Company was merely a mortgagee *out of possession whose debt had been paid.*

If a total stranger had trespassed on the Belding Tract and cut and removed timber, the cause of action for the trespass would not have been in the Lumber Company. That cause of action would be in the Logging Company while it was in possession and ownership of the equitable title and, thereafter, in the Corporation while it was in possession and the owner of the equitable title for it would be their timber that had been removed and not the timber of the Lumber Company.

The judgment, insofar as it holds the Corporation liable for trespass, was the result of the Court's basically erroneous legal concept of the law of trespass. The Court applied the following rule (Tr. 287):

> "The Court: Trespass is a matter that depends upon where the legal title lies; not where the equitable ownership lies."

While this statement may, or may not, be a correct statement of the law when applied to the holder of the legal title *in possession as against a stranger,* it does not apply to the holder of a naked legal title in TRUST for the equitable owner when the equitable owner is himself in possession, because the fundamental rule is that trespass is *an invasion of the right of possession.*

In *Caro v. Wollenberg,* 68 Or. 420, the Oregon Supreme Court held:

> "After a mortgagee has received payment of his debt, he really holds the property in trust for the mortgagor."

In the brief of Appellants Glaser, additional authorities are cited which establish the proposition that where title is conveyed to be held as security for the payment of an indebtedness, that the title is held in trust for the grantor as security and after the debt is paid, the grantee holds only the naked legal title in trust for the grantor.

In the case at bar, the debt had been paid and the Lumber Company merely held the naked legal title in TRUST for the Logging Company. It was not then, or at any other time, in possession of the property. The possession was always in the Logging Company until it con-

veyed its interests to the Corporation and the Corporation was thereafter in possession under its equitable title as successor in interest of the Logging Company. That was the situation at the time of the alleged trespass.

In 52 Am. Jur. 843 (Title: Trespass, Sec. 11), the text says:

> "The gist of a trespass to realty lies in the *disturbance of possession* . . . . . " (Emphasis supplied.)

At page 854, Section 25, the text says:

> "Since, as in the case of trespass to personalty, the gist of an action of trespass to real property is the *injury to the right of possession,* in order to maintain the action the *plaintiff must,* at the time of the trespass, *have been in the actual or constructive possession* of the land on which the acts of trespass were committed." (Emphasis supplied.)

At page 860, Section 30, the text says:

> "Since trespass quare clausum fregit is a *possessory action,* a landlord, being in neither actual nor constructive possession, is not entitled to bring the action during the term of the tenant, although where the tenancy is one at will, some cases permit the maintenance of the action." (Emphasis supplied.)

Here, the actual ownership was, at the time of the alleged trespass, either in the Logging Company or in the Corporation as owners. They were in possession of the property and engaged in logging it. The Lumber Company was not then, nor had it ever been in possession.

The Lumber Company's option to buy logs from the owners at market price which it might never exercise, did not give the Lumber Company possession or any

right of possession of the timber lands and the removal of logs by the Logging Company or the Corporation, was not an invasion of any right of possession in the Lumber Company.

In short, trespass cannot be asserted by the holder of the naked legal title in trust for the owner *as against the owner who always was and is then in possession.*

Section 105.810 Oregon Revised Statutes, upon which the Lumber Company relies, in charging the Corporation with trespass, so far as material, provides:

> " . . . whenever any person, without lawful authority, wilfully . . . . . severs from the land of another . . . . . or cuts down, ... or carries off any tree, timber, ... on the land of another person . . . . . in an action by such person . . . . . against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass."

This statute does not attempt to define who shall be deemed the owner for the purpose of prosecuting such an action. It certainly does not confine the cause of action to the holder of a naked legal title in trust for another. The use of the words "land of another" was obviously intended to give the cause of action to the true or beneficial owner of the land. It obviously leaves for determination, in each case, the question who is the real party in interest or injured by the trespass. It may be a tenant in possession, or the beneficial owner that is injured.

The statute most certainly does not create a cause of action in favor of the holder of the naked legal title *as against the beneficial owner who is in possession.* It only

creates a cause of action in favor of the true owner as *against a stranger* who has no interest in the property and is *not in possession* thereof.

There was no disturbance of the Lumber Company's possession or right of possession for it had none and consequently, there was no trespass as against the Lumber Company.

There is no basis for any judgment in favor of the Lumber Company for the value of the timber for it did not own the timber and certainly none for trebling the damages.

Assuming, without admitting, that the timber was cut and sold in violation of the option, the only remedy in favor of the Lumber Company would be the damage sustained from the failure to tender the logs to the Lumber Company, which damage would be the difference between the market price, which was the base price under the contract, and any amount in excess thereof that the Lumber Company may have been forced to pay in order to obtain an equal amount of timber. But there is not the slightest foundation for an award of the damages consisting of the *value* of the timber when the Plaintiff was not the owner thereof.

POINT III

The Court erred in holding the Corporation liable for $118,000.00 damages for loss of profits allegedly resulting from the failure to supply logs for the operation of the Batterson Mill.

Argument

The action as against the Corporation, is in *tort* and not for breach of contract. The Corporation was not a party to the contract which gave the Lumber Company the option to buy logs for the operation of the Batterson Mill at market price. That contract was with the Logging Company only.

The Lumber Company refuses to recognize the Corporation as an assignee of the contract or as a successor in interest of the Logging Company and the Court below, by its decree, held that the transfer from the Logging Company to the Corporation to be void.

In this situation, the Corporation obviously was under no contractual obligation to supply logs for the operation of the Batterson Mill. Assuming, without admitting, that the Logging Company breached that contract, it does not create any cause of action against the Corporation for such breach. Such a cause of action, if any there be, would be against the Logging Company only.

POINT IV

The Court below erred in awarding $118,000.00 damages for loss of profits allegedly resulting from the failure to supply logs for the operation of the Batterson Mill because there is no substantial evidence that any damage was sustained at all.

Argument

The Court assessed damages against the Corporation, as well as the Logging Company, in the sum of $118,000.00 for loss of profits which the Lumber Company claims to have sustained because it was not given the option to purchase logs for the operation of the Batterson Mill subsequent to October 1st when the mill was re-opened by the Lumber Company or Gould.

Now the contract only gave the Lumber Company the option to purchase logs for the Batterson Mill sufficient for a *one shift operation.* That was the extent of that particular obligation (Tr. 134, Sub-div. d, and 135, Sub-div. a). The testimony of the Lumber Company's own witness, in charge of the particular matter of obtaining logs for that mill, establishes that the mill had sufficient logs to operate that mill on a *one shift basis* during all of the time in question.

William O. Gansberg, the Lumber Company's employee and witness, testified (Tr. 468) that he was sent down to the Batterson area by Mr. Holm to secure suitable logs for the mill at Batterson. (Tr. 469.)

"Q. What is the fact as to whether or not you were able to get all the logs you needed to operate the Batterson Mill after January 16th, 1952?

A. Well, we were able to get enough logs to run on a one-shift basis . . . . . "

He also testified that part of the time the mill was shut down because of strikes (Tr. 470) and because of fire weather (Tr. 471). He then testified, on cross examination:

"Q. Did you buy all the logs that were offered to Buffelen Manufacturing Company at the millpond or for the millpond?

A. Yes. I marked the logs that were to be sent over to the millpond.

Q. Did you buy the million feet of logs that were offered by Smith & Wright?

A. The ones that were suitable for our operation." (Tr. 471.)

. . . . . .

Q. How many shifts did you operate?

A. One.

Q. One shift straight through during all of the time that you were operating; is that correct?

A. No. There were shutdowns for strike and fire weather."

This evidence coming from the Lumber Company's own Representative and witness clearly establishes that it sustained no loss of profit from the operation of the Batterson Mill because it had all the logs it needed for the one shift basis, which was the extent of the option obligation.

POINT V

The Lumber Company could not, in any event, maintain an action for loss of profits resulting from the alleged failure to supply logs to the Batterson Mill because it had transferred the operation of the Mill to Roy Gould or his corporation, Diamond Lumber Company, under an agreement by which they were to receive all profits from the operation of the Mill subsequent to October 1, 1951, and they were to sustain all losses therefrom. The Lumber Company is not the real party in interest in this respect.

Argument

The record establishes that prior to September 27, 1951, the Lumber Company had entered into negotiations with Roy Gould and/or Diamond Lumber Company for the sale of the Batterson Mill. The mill had been shut down on June 29, 1951, and was not opened until October 1, 1951. Gould, Plaintiff's witness, testified (Tr. 235) that an arrangement had been made that the Diamond Lumber Company was to operate the mill and that it was to have the profits from its operation.

George Holm, the Lumber Company's division manager and witness, testified (Tr. 255) that Gould (Diamond Lumber Company)

> "was to receive all the profits from the operation of the mill while he was so operating"

and that he was to

> "assume any losses if there were any losses sustained."

Assuming, without admitting, that loss of profits was sustained from the alleged failure to supply logs to the Batterson Mill, it was not the Lumber Company's loss. It was the loss of Gould or Diamond Lumber Company, the operators of that mill subsequent to October 1, 1951, and plaintiff had no cause of action therefor in any event.

POINT VI

The Court below erred in admitting in evidence Appellee's Exhibits 19-A, 19-B, 19-C and 22. The error is highly prejudicial. Without those exhibits, there is not a scintilla of evidence in the record to establish alleged loss of profits.

Argument
Re Exhibits 19A, B and C

Copies of these three exhibits are attached as an appendix to the brief of Appellant Bart MeKenney and Marie McKenney. They purport to be a "cost report" for the operation of the Batterson Mill from June 30, 1949, to May 31, 1951, a period of time preceding the alleged breach of the contract, and purport to show the profits realized and losses sustained from the operation of the Batterson Mill during that period of time.

The alleged loss of profits for which recovery was sought and awarded by the judgment, is for the period of time from October 1, 1951 to the time of the trial of the action, to-wit, December 1952. Only fifteen days of this period preceded the commencement of the action, to-wit, October 15, 1951 (Tr. 6). Appellee claims that

these exhibits show that it realized profits of from six to nine thousand dollars a month during the period prior to the alleged breach. The contention was made and adopted by the Court below that if logs had been supplied to the Batterson Mill during the latter period, it would have realized a similar profit, and the alleged failure to supply logs resulted in the loss of the profits to the extent of $118,000.00.

We have already demonstrated in Point IV that the mill actually was in operation during that latter period of time except for the intervals when the mill was shut down by reason of breakdowns, strikes and fire weather (Tr. 470-474); that it actually operated throughout that whole period of time, except as aforesaid, on a one shift basis (Tr. 469) and that it had sufficient logs, obtained from the timber lands in question and from other sources, to operate the mill on a one shift basis (Tr. 469-470).

(a) Since the mill was in operation after October 1, 1951, on a one shift basis (Tr. 469), the best evidence on the issue of profit and loss was the actual cost of the logs, operating expense, etc. as against gross revenue or income. There was no occasion for resorting to past experience for that purpose. Evidence of past experience might be admissible if the mill had been entirely shut down so that primary evidence would not be available. Moreover, profit and loss, as reflected in the exhibit, may have resulted from very favorable market conditions for the sale of lumber or from the introduction of efficient operating methods and the like. The exhibits

themselves demonstrate that the profit figures shown thereon, have no probative value because it appears that from month to month the profits and losses varied tremendously and had no relation to the quantity of logs cut in that mill. There was no substantial consistency between the amount of logs cut and the profits or losses realized which would warrant the acceptance of the figures as a true indication of probable profits if the mill was in operation.

For example: In the month of May 1951 (p. C-14, Ex. 19-C), the mill cut 1,780,803 feet of lumber and showed a "book profit" of $4,298.41; whereas, in the month of June 1951 (p. C-12 of Ex. 19-C) they cut 1,896,434 feet of lumber and sustained a loss of $13,-997.60. In other words, although they cut more lumber, they sustained almost a $14,000.00 loss. This illustration can be duplicated many times by reference to the exhibits, demonstrating conclusively that the tabulations do not truly reflect profit and loss from operations, and that there is something seriously wrong with the method of building up the summaries.

(b) The exhibits consisted of "summaries" arbitrarily made from Plaintiff's books, but the account books were not produced in court (admitted, Tr. 204). Appellants had no opportunity to examine the books or cross-examine the accountant who prepared the summaries to verify the accuracy thereof. There was no way of determining whether the books from which the summaries were made, truly reflected all of the elements that affect the realization of profit or loss. There was no

opportunity to inquire into the inter-company or departmental relations and transactions to determine whether the costs allocated as between them, were true or fictitious or purely arbitrary.

The precautionery conditions precedent to the use of summaries were entirely ignored.

Objection was made to the introduction of the exhibits.

The Court below was apparently of the opinion, when the exhibits were first tendered, that the books of account were in Court, for during the cross-examination, the Court inquired:

"Aren't the books here? (Tr. 204)

. . . . .

The Court: I understand, but then aren't the books here?

Mr. Dezendorf: The books are not here. No.

The Court: I understood you to say before that they were."

We submit that the admission of these summaries violated the fundamental rule that summaries are only admissible in evidence when the records from which they were made, are themselves brought into Court and made available for the inspection of the other party and for a cross-examination, and that in the absence of such precautionery measures, summaries are not admissible.

The summaries are not original books of entry, nor are they account books kept and maintained in the ordinary course of business. There is not even a word of testimony that the records from which the summaries

were made, were accurately kept, and that they correctly reflect the operations.

The exhibits were clearly inadmissible:

Hooven v. First National Bank, 66 A.L.R. 1204, 273 Pac. 257, 134 Okl. 217;
20 Am. Jur. p. 698, Sec. 831;
Wigmore, Evidence, Sec. 1230;
1 Greenleaf, Evidence, Sec. 93.

In the *Hooven* case, the Court said:

"We realize that the use of summaries is an exception to the rule and countenanced only by reason of necessity and convenience; a safeguard and prerequisite is the production of the originals in court and an opportunity for inspection of them by the adverse party."

In 20 Am. Jur., Sec. 831, page 698, the text is as follows:

"Also where books and papers are voluminous, a qualified witness may summarize and explain the facts shown by such books and papers *when they are all in court and the opposing counsel has full opportunity to cross-examine as to the correctness of the witness' testimony*. It is said, however, that in such cases it is not proper for the expert simply to testify that the books show certain facts. The *books themselves must be introduced as primary evidence* and the testimony of the expert is secondary and explanatory only." (Emphasis suupplied.)

Re Exhibit 22

Exhibit 22 is printed in full at page 480 of the transcript. It purports to be a summary of the profits and losses for the period July 1, 1951, to October 31, 1952. The first three months appearing thereon, July, August

and September, 1951, is the period preceding the alleged breach of contract and during which the mill was voluntarily closed by the Lumber Company for vacations and for repairs, etc. The balance of the summary purports to cover the period subsequent to the alleged breach. The summary was offered in evidence (Tr. 462). Objection was interposed on the ground that no foundation for it had been laid; that it was a mere conclusion; that there was no showing that the figures were correct or what they were derived from, and that it was a purely self-serving document (Tr. 463). The Court, at first, excluded the document (Tr. 464). The evidence showed that part of the time the mill was shut down by reason of strikes, breakdowns, and also on account of fire weather (Tr. 470-471). Miles testified (Tr. 475) that he had the books from which the summary was prepared and that it was an accurate representation of what the books show.

But there is not a word of the testimony that the books of account accurately reflect the operations. The exhibit was again offered in evidence. Lengthy objections were interposed (Tr. 475-477), and the Court admitted the exhibit (Tr. 479), saying:

> "The Court: I think with the situation as it is, I will receive it. I will still consider your objection after I consider all the testimony."

We submit that the exhibit was improperly admitted for a number of reasons:

First: It shows, on its face, that in October, November and December, the mill was operated by Gould (Diamond Lumber Company) and the record estab-

lishes, by Plaintiff's own witnesses, that Gould operated the mill under an agreement that he was to realize the profits and absorb the losses if any there be. Hence, the Lumber Company cannot claim any loss of profits which, in any event, would have been the property of Gould.

Secondly: The exhibit shows that during the remaining ten months, January to October, the mill operated six months on a one shift basis; that it was closed in January, February, and March, and it shows there was a strike in May. The reasons for the closure in January, February, and March, is not disclosed by the exhibit. But Gansberg, Plaintiff's representative who looked after the supply of logs for the mill, testified that they had enough logs during the period from January 1952 to run the mill on a one shift basis and that they had shut-downs by reason of strikes, mill break-downs, and fire weather (Tr. 469 to 471), it is evident that the closure during the months of January, February and March was not due to failure to supply logs, but was due to the other causes described by him.

The lack of probative value of the exhibit appears from its face because of numerous absurd results disclosed by the figures.

For example: In the month of March 1952, the mill was closed and yet it shows fixed expense of $20,837.76 as against $5,771.24 for the month of April when the mill was in operation.

Another illustration: In July 1952, the mill operated on a one shift basis. It had a payroll for that month of

$9,626.86 with a loss of $570.05, while in the mouth of August with substantially the same payroll, $9,357.95, on a one shift basis, it shows a profit of $7,414.86. Such figures cannot be reconciled and a summary producing such results, obviously cannot be evidence of profits and loss upon which a judgment is to be predicated.

The admission of these exhibits is highly prejudicial for the reason that the award of $118,000.00 damages was predicated upon these exhibits. It was by means of these exhibits that it was claimed that the mill had been earning from six to nine thousand dollars a month in the prior period and this monthly profit allegedly earned during the earlier period, was applied to the subsequent period entirely upon those exhibits.

Without those exhibits in the record, there is not a scintilla of evidence upon which a finding can be sustained that (a) losses were sustained subsequent to October 1, 1951, and (b) the amount thereof.

CONCLUSION

For the reasons assigned in the brief of the Appellants Einar Glaser and Dorothy Glaser, and for the reasons assigned herein, the judgment against the Corporation should be reversed.

Respectfully submitted,

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